

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of August, two thousand and eight.

PRESENT: HON. JOSEPH M. McLAUGHLIN,
HON. GUIDO CALABRESI,
HON. RICHARD C. WESLEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

-v.-

No. 07-4180-cr

HAROLD SAUNDERS,

Defendant-Appellant.

1 Appearing for Appellee: COLLEEN P. CASSIDY, Federal Defenders of New
2 York, Inc., Appeals Bureau, New York, N.Y.
3
4 Appearing for Defendant-Appellant: KATHLEEN NAUGHTON, Special Assistant United
5 States Attorney (Peter A. Norling, Assistant United
6 States Attorney, *of counsel*) for Benton J. Campbell,
7 United States Attorney for the Eastern District of
8 New York New York, N.Y.
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11 **UPON DUE CONSIDERATION** of this appeal from a judgment entered in the United States
12 District Court for the Eastern District of New York (Gershon, *J.*), it is hereby **ORDERED**,
13 **ADJUDGED, AND DECREED** that the judgment of the District Court is **AFFIRMED**.
14

15 Defendant-Appellant Harold Saunders appeals from a judgment of conviction entered in
16 the United States District Court for the Eastern District of New York (Gershon, *J.*). The
17 conviction was entered pursuant to Saunders’s guilty plea on a charged count of possessing a
18 firearm after a previous conviction for a felony, in violation of 18 U.S.C. § 922(g). The District
19 Court sentenced him principally to 100 months’ imprisonment. He challenges that sentence.

20 Saunders argues that the district court erred by treating his previous New York State
21 youthful offender adjudication—which stemmed from a robbery committed when he was 17
22 years old—as an “adult conviction” under United States Sentencing Guideline § 2K2.1. Under
23 that Guideline, Saunders was eligible for a base offense level of 24 if the charged offense (the
24 weapon possession) was committed after Saunders had “sustain[ed] at least two felony
25 convictions of either a crime of violence or a controlled substance offense.” The robbery was one
26 of the two felony convictions on which the Probation Department relied in recommending base
27 level of 24. The government subsequently supported that position, and the district court adopted
28 it. An offense committed prior to the age of 18 may be counted towards the two convictions only
29 “if it is classified as an adult conviction under the laws of the jurisdiction in which the defednant

1 was convicted.” U.S.S.G. § 2K2.1, App. Note 1. Because the district court’s interpretation of
2 the Sentencing Guidelines raises a purely legal question, we review its decision *de novo*. *United*
3 *States v. Matthews*, 205 F.3d 544, 545 (2d Cir. 2000).

4 In *United States v. Cuello*, 357 F.3d 162 (2d Cir. 2004), we held that “determining
5 whether a New York youthful offender adjudication is ‘classified as an adult conviction under the
6 laws of’ New York for the purpose of U.S.S.G. § 2K2.1 requires ‘district court[s] to examine the
7 substance of the prior conviction at issue; to ‘focus on the nature of the proceedings, the
8 sentences received, and the actual time served.’” *Id.* at 168-69 (quoting *United States v. Driskell*,
9 277 F.3d 150, 157 (2d Cir. 2002)). Here, those factors support the district court’s determination.
10 Saunders was convicted in an adult court of a felony crime of violence, and the probationary term
11 he received was supervised by the Department of Probation, which monitors adult probationers.

12 In prior cases, we have specifically focused on whether an offender served his time in an
13 adult prison. *See, e.g., United States v. Pereira*, 465 F.3d 515, 522 (2d Cir. 2006) (“Upon
14 consideration of all the circumstances, with particular focus on the fact that the defendant was
15 convicted in an adult court and served his sentence in an adult facility, we find that the district
16 court’s treatment of his youthful offender adjudication as an ‘adult conviction’ for purposes of
17 calculating the offense level under the Unlawful Reentry Guideline was a proper exercise of the
18 court’s discretion.”); *Driskell*, 277 F.3d at 157. The import of that factor is ambiguous in the
19 case before us. Saunders was not originally sentenced to serve any time on the robbery
20 adjudication, but he later violated this probation and was sentenced to a term in custody. The
21 government has been unable to demonstrate where he served it, but has presented evidence that it
22 was “likely” served at Riker’s Island—an adult prison, albeit one with a separate facility for

1 youth. Saunders, meanwhile, did not provide any evidence about where he served his sentence,
2 despite being given the opportunity to do so. *See United States v. Jackson*, 504 F.3d 250, 253
3 (2d Cir. 2007) (per curiam). In any event, we have explicitly disclaimed the notion “that a
4 district court must make a finding of fact on the issue of where a defendant served his youthful
5 offender sentence,” *id.* at 253, and thus the district court’s failure to do so here is not dispositive.

6 Saunders argues that our decision in *Cuello* was incorrect and should be revisited by this
7 Court *en banc*. This we, as a panel, cannot do. *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d
8 Cir. 2007). Alternatively, Saunders asks us to certify to the New York Court of Appeals the
9 question of whether New York classifies a youthful offender adjudication as an adult conviction.
10 In light of *Cuello*, however, we cannot conclude that we lack sufficient precedents to make a
11 determination. *Tinelli v. Redl*, 199 F.3d 603, 606 n.5 (2d Cir. 1999) (per curiam).

12 We have considered all of Appellant’s claims and found them to be without merit.
13 Accordingly, we AFFIRM the judgment of the district court.

14 FOR THE COURT:
15 Catherine O’Hagan Wolfe, Clerk
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18 By: _____
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